No 351. competent to her, ' by and through the said marriage;' such words would have operated a total extinction or renunciation of the wife's right, as that comprehends all possible events; whereas the words ' by and through the decease of ' the husband,' is quite another thing, and comprehends only one event.

THE LORDS repelled the defence, and found the pursuer not excluded by the contract of marriage, from claiming a share of the goods in communion, in the event of the wife's predeceasing the husband.

But, on advising a reclaiming petition and answers,

THE LORDS found, that Helen Hutcheson having accepted the provisions made her in the contract of marriage, in place of all third, or half of moveables, conquest, and all others, she, her executors, or nearest of kin can claim; that her nearest of kin are thereby excluded from any claim to a share of the husband's moveables; and that the words, ' by and through the decease of the said Gilbert Lawrie,' cannot be understood to restrict the former clause, so as that the executors should only be excluded in the event of her husband's predecease; since, in that event, the executors, or nearest of kin, would have had no claim to any share of the husband's moveables, but that the said words, ' by and through the decease of the said Gilbert Lawrie,' do apply to the wife herself, and not to her nearest of kin; and assoilzied.

C. Home, No 229. p. 373.

SECT. VIII.

Revocation how barred.

1575. *June* 16. MURRAY *against* LIVINGSTON.

No 352. MARRIAGE being dissolved upon account of adultery; found that the adulterous person was barred from revoking.

Fol. Dic. v. 1. p. 412. Colville.

*** See this case, No 2. p. 328.

1678. *February* 15. GORDON *against* MAXWELL.

No 353. A wife was allowed to revoke a dis- MARY GORDON, being heretrix of the lands of Robertoun, having by her first marriage a son, dispones her land to Robert Maxwell, who disponed the same

No 353.
position granted by her to her husband, tho' she had judicially ratified it, and sworn never to come in the contiary.

to John Glendinning her second husband, within a month of the disposition made by the said Mary to Maxwell; after Glendinning's death, she is now married to John Muir late tutor of Cassincarrie, and hath disponed the estate to him, whereupon he is infeft; and she and her husband pursue reduction and improbation against Robert Maxwell, and against the son of Glendinning. The reasons of reduction are, 1*mo*, That the foresaid disposition in favours of Maxwell was only in trust, to the behoof of Glendinning her husband, to evite the power of revocation which the law allows to husband or wife, to recal the dispositions made by either to others during the marriage; which must be presumed, seeing Maxwell re-dispones to the husband within a month, which is an obvious eliding of the law, and most unfavourable in the case of a woman disponing her inheritance to the behoof of her second husband, in prejudice of the heirs of her own body, having then a son of a former husband. 2*do*, The pursuer was circumvened, in so far as she did not subscribe this disposition, after it was drawn up and read to her, but being an illiterate woman, gave warrant to two notaries to subscribe a writ for her, which was related to her as a tailzie of her estate, substituting her husband to the heirs of her own body, but the notaries drew it up of another tenor, as it now stands. 3*tio*, She insisted in the improbation of Maxwell's sasine, and offered to prove it by the notary and witnesses inserted, whereby Glendinning's infeftment would fall in consequence. The defender *alleged*, 1*mo*, *Minor non tenetur placitare super hæreditate paterna*, and therefore Glendinning being infeft, his son being a minor, is secure till his majority. 2*do*, The pursuer hath ratified judicially this disposition, and sworn 'never to come in the contrair.' 3*tio*, There being no contract of marriage betwixt the pursuer and Glendinning, her disposition to him is in place of a contract, and so is no donation, the value of the estate being very small. The pursuer answered to the first, That the brocard *Minor non tenetur*, &c. hath many exceptions, and doth only relate to quarrelling the minor's right upon defects or want of evidence, but cannot extend to the faults of the defunct, either in fraud or force, much less to the benefit of revocation of deeds between husband and wife; for such are null *nisi morte confirmentur*, and the granters thereof may summarily insist upon their own right, wherein if the disposition *stante matrimonio* be obtruded, the reply upon nullity or revocation is competent, either without reduction or declarator, in the same way as a reversion, or back-bond of the husband, would be competent against his heir. To the second it was answered, 1*mo*, That the judicial oath of a wife is required in law to secure her against force, fear, or reverence of her husband, and so bears, That she was not compelled; and though it bear a general clause, That she shall never come in the contrary, that can only be understood *secundum subjectam materiam*, that she shall not quarrel the same upon force or fear; but could neither exclude reversion or back-bond, much less a posterior revocation, upon the privilege of law. 2*do*, The judicial ratification is not instructed by the act of any inferior court, unless it had been subscribed by the

No 353. party, but the assertion of a clerk, without the party's subscription, is not sufficient, as has been oftimes found. To the third defence it was answered, That this disposition cannot be sustained as a contract of marriage, because there is nothing provided to the wife on the husband's part; and though there were, yet it is a most unproportionable and irrational provision, to pass by her own children and provide to a husband. The defender *replied*, that whatever may be pretended, if the disposition had been made to the husband, or had been clearly made to his behoof, yet here the disposition was made to Maxwell a stranger, who disponed to the husband, so that the minor must dispute and hazard his father's right upon the trust pretended to be in Maxwell's person, which though it were competent against a minor, yet were only probable by oath of the defender, or writ; but no writ is pretended, and Maxwell's oath cannot be received against his singular successor, nor can trust be presumed, because Maxwell dispones to the husband with absolute warrandice. And as to the second defence, on the wife's ratification and judicial oath, it stands still relevant, because not only hath the clerk subscribed here, but the judge also, which is abundantly sufficient, seeing the woman could not subscribe; and likewise the third defence stands relevant, because the estate being small, and the husband a gentleman, it was but a competent tocher, though he had nothing; but it is offered to be proved, that he made a provision in favours of the pursuer.

THE LORDS repelled the first defence, and found that the revocation of husband or wife, of any deed done to the other spouse during the marriage, immediately, or by interposed persons, was competent summarily, and not excluded by the minor's privilege. They did also repel the second defence, upon the judicial ratification and oath. And as to the third defence, they did, before answer, ordain the provision made by the husband, and the value of the estate disponed to be proved; and in respect of the presumption of the trust, by the disposition to the husband, (albeit it did contain absolute warrandice seeing there might be a back-bond limiting the warrandice); the LORDS *ex officio* ordained Maxwell to condescend on the onerous cause of the dispositions of the pursuer and the second spouse to him, and to adduce such evidences therefor as he could. THE LORDS did also ordain the writer and witnesses to be examined anent the manner of her subscribing the disposition, reserving to the parties to be heard, whether these testimonies should remain *in retentis* till the defender's majority, or whether his privilege did not exclude reduction upon his father's fault by force or fraud; they did also assign the same time for improving Maxwell's sasine by the notary and witnesses inserted. See MINOR NON TENETUR, &c.

Fol. Dic. v. 1. *p.* 412. *Stair, v.* 2. *p.* 614.

*** Fountainhall reports the same case:

No 353.

FOUND, the maxim *non tenetur minor placitare* cannot be obtruded against reduction on this head, as *donatio inter virum et uxorem*; and that a wife's judicial ratifications is not valid, unless either subscribed by herself, or two notaries for her; yet see the 83d act Parl. 11, James III. which this decision corrects.

Fountainhall, MS.

1685. *December* 4. RICHARDSON *against* MICHIE and MARSHALL.

No 354.
A wife bound herself not to revoke her contract of marriage, without consent of a third party. She, however, afterwards renounced part of her jointure, and ratified the renunciation upon oath. After her husband's death, she revoked the renunciation, as being *donatio inter virum et uxorem*, and as unlawful to be taken by the husband. The Lords sustained the renunciation *ob religionem juramenti.*

THIS following point being reported by Balcasky, between Mr John Richardson, town-clerk of Edinburgh, and Michie and Marshall, was ordained to be heard in presence.—A wife, in a contract of marriage, is provided to a liferent, and a prohibitory clause is adjected, that it shall not be leisome nor lawful for her to discharge or renounce any clauses introduced in her favours, without the consent of a third party named; afterwards, at her husband's desire, she is moved to renounce a part of this jointure in favours of himself, and she ratifies it upon oath; this renunciation and oath is afterwards quarrelled and revoked by her, and her second husband; because contrary to the restriction imposed on her by the foresaid contract. *Answered*, 1*mo*, It is not conceived *irritanter et resolutive*, nor the deed declared null. 2*do*, Her oath validates it, and she cannot be reponed, by 83d act of Parl. 1481; and though the oaths of minors be discharged by the 19th Parl. 1681, yet that is only *vi illius statuti;* and the Parliament thought it not fit to extend it to the oaths given by wives.—If this had been a renunciation in favours of a third party purchasing *bona fide* for an onerous cause, much might be said to sustain it, notwithstanding the prohibitory clause; but being in favours of the husband, it is *contra pacta dotalia et fidem tabularum nuptialium*, and the renunciation being *contra legem contractus*, it annuls the deed; *quod contra legem fit ipso jure nullum est*, though it bear no irritant clause. See *Vinn. quæst. select. lib.* 1. *cap.* 1. And Stair, in his decisions, 18th February 1663, Birse and Bouglas, No 165. p. 5961., tells us, a wife swearing to a debt, her oath was declared null; and here it is also *in re illicita*, the husband knowing the interdiction on his wife.

On the 11th of December, being heard in presence, besides this point, they also debated another, viz. in the contract of marriage the father is obliged to take the whole conquest to the children of the marriage in fee; afterwards, he purchases a tenement, and takes it to his heirs; there being five children, the four younger say, they are creditors on the clause of conquest, and the heir can only have a fifth part, and that the father, by a gratuitous deed, (for this would not hinder the father to contract for onerous causes) could not prejudge his